United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2065

PLEASE RETURN TO
RECORDS ROOM

To be argued by
RALPH McMURRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR GATES,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,
Auburn State Prison,

Respondent-Appellee.

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P/S

BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
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BRIEF FOR RESPONDENT-APPELLEE

Petitioner-appellant appeals from a decision of the United States District Court for the Southern District of New York, Carter, J., denying petitioner's application for a writ of habeas corpus. The decision was dated May 27, 1976. On June 17, 1976, petitioner-appellant was granted a certificate of probable cause.

Questions Presented

1. Whether the Supreme Court's decision in Stone v. Powell, 44 U.S.L.W. 5313 (1976), forecloses federal habeas review of petitioner-appellant's Fourth Amendment claim?

2. Whether petitioner-appellant's procedural defaults in state court bar federal habeas review of his Fourth Amendment claim?

Facts and Procedural Background

On September 7, 1966, one Patricia Gates was stabbed to death in her home in Spring Valley, New York. Her estranged husband was arrested for the crime and was ultimately convicted in the Rockland County Court after trial by jury. Petitioner-appellant (hereafter "petitioner") was sentenced to life imprisonment in February, 1967.

Key evidence in the case consisted of palmprints taken from the bathroom window sill. These palmprints were found to match those of petitioner's.

Prior to trial, petitioner made no motion to suppress the palmprints on Fourth Amendment grounds.

Well into the trial, petitioner made his first and only trial level objection to the "taking" of the fingerprints. The objection was a general catchall "constitutional" objection which failed to specify the basis of the grounds for objection. The exchange in

which the objection was made is as follows:

(In Chambers)

THE COURT: Mr. Newman, you inform me that you want to make an objection outside the presence of the jury.

MR. NEWMAN: Right. As I understand it, the District Attorney is about to introduce into evidence fingerprints which were taken by the present witness, Captain Eisgrau of the Clarkstown Police Department.

MR. MEEHAN: (D.A.): Did you say fingerprints?

MR. NEWMAN: Hand prints, and which were taken at the Clarkstown Police Department on the morning of September 7, 1966. While there is no question, and we will stipulate, that they were taken of the defendant in this case, we raise objection not to the fact that they are or not his prints but to the introduction of those prints on the basis that this man's constitutional rights both under the State and Federal constitution have been violated by the taking of these prints and as such we object to them.

THE COURT: Your objection is then on constitutional grounds to the mere fact of the taking of the prints?

MR. NEWMAN: Yes, sir.

THE COURT: As such?

MR. NEWMAN: Right, sir.

THE COURT: I will overrule that objection.

MR. NEWMAN: Exception.

MR. MEEHAN: Your Honor---

THE COURT: And you will have a similar objection without having to renew it, for the record to any further introduction of prints taken of the defendant by any other law enforcement officer.

MR. NEWMAN: Fine, sir.

THE COURT: And with the same ruling.

(T. 535-536, emphasis added)

Petitioner was later convicted.

On appeal, the Appellate Division affirmed, without opinion, petitioner's conviction. 29 A D 2d 843, 288 N.Y.S. 2d 862 (2d Dept., 1968).

The Court of Appeals unanimously affirmed, with an opinion. 24 N Y 2d 666, 301 N.Y.S. 2d 597 (1969). The Court after careful consideration found that the evidence in the case was sufficient to establish defendant's guilt beyond a reasonable doubt. The Court also ruled that petitioner's claim that his palmprints were introduced into evidence in violation of the Fourth Amendment had not been preserved for appellate review because petitioner had failed to challenge the evidence either by pretrial motion or by objection at trial.

On April 22, 1969, the Supreme Court decided Davis v. Mississippi, 394 U.S. 721 (1969). The Court held that fingerprint evidence was subject to the proscriptions of the Fourth and Fourteenth Amendments. The Court found that the exclusionary rule was "comprehensive" and extended to all evidence, to which fingerprints were no exception. Davis, supra, at 724. Davis was decided 22 days prior to the decision of the State Court of Appeals in People v. Gates.

Petitioner then sought coram nobis relief in the state courts. In December, 1969, the Rockland County Court denied relief in an opinion reported at 61 Misc 2d 250, 305 N.Y.S. 2d 583. The court found there had been no pretrial motion to suppress, no objections during trial, and no post trial motions based on Fourth Amendment grounds. The court further noted that petitioner's Fourth Amendment claim was made for the first time in argument before the State Court of Appeals on February 27, 1969. This assertion is not disputed by petitioner now. The court, while recognizing that state procedural requirements could not be used as a procedural device to deprive defendants of constitutional rights, also noted that compliance with procedural

requirements are mandatory where legitimate interests are served by the procedural requirement. The court concluded that in the circumstances petitioner was not entitled to relief by reason of his procedural default.

The court also distinguished between fundamental constitutional rights, such as the right to counsel and the right against the use of illegally seized evidence. The court noted that the integrity of the evidence in Fourth Amendment cases was not in doubt and concluded that Davis v. Mississippi should not be given retroactive effect.

The Appellate Division affirmed the Rockland County Court's denial of relief in an opinion reported at 36 A D 2d 761 (2d Dept., 1971). The Appellate Division concluded that petitioner could not seek collateral relief on the Fourth Amendment issue because of his procedural defaults.

Further leave to appeal to the Court of Appeals was denied January, 1972.

Petitioner then sought federal habeas relief. After briefs had been submitted by both sides, the

District Court addressed a letter to both counsel posing the following three questions:

> 1. Is it true, as the portions of the record quoted by Mr. Berman seem to show, that objection was made at trial to the admission of the evidence in question?
>
> 2. If such objection was made, how is it that three New York State court's decisions were premised on the belief that such objection was not made? See 24 N Y 2d 666, 61 Misc 2d 250, and 36 A D 2d 761. Do these decisions mean that while objection was made, it was not adequate under New York law as it then was (Code of Criminal Procedure § 815-d)? Explain.
>
> 3. If objection was made at trial but not before, and the failure to object prior to trial is not excused under § 813-d (or, I suppose, if no objection were made at trial), is this case one of "deliberate bypass" of existing state remedies? (See, Fay v. Noia, 372 U.S. 391 (1963).

Both sides responded in letters dated respectively February 24, 1976 and March 2, 1976. The District Court, in an opinion dated May 27, 1976, then denied petitioner relief on the grounds of procedural default in the state courts. This appeal followed.

POINT I

FEDERAL HABEAS RELIEF IS FORECLOSED BY THE SUPREME COURT'S DECISION IN STONE v. POWELL.

Since the District Court's decision in this case, the Supreme Court decided Stone v. Powell and Wolff v. Rice, ___ U.S. ___, 44 U.S.L.W. 5313 (July 6, 1976). It is not surprising that petitioner has failed to mention these decisions since their holdings foreclose federal habeas relief in the instant case and render petitioner's discussion of the question of procedural default academic.

In Stone v. Powell the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground the evidence obtained in an unconstitutional search or seizure was introduced at his trial." (supra, at 5321) (emphasis added). See Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring opinion). The Court's reference to "an opportunity for full and fair litigation" is significant because it is the determinative factor which decides

whether a state prisoner may raise a Fourth Amendment violation claim in a federal habeas corpus proceeding.

The reasoning behind the decision in Stone is that while the purposes for the exclusionary rule were chiefly to deter future unlawful police conduct and to preserve the integrity of the judicial process, these are minimal concerns where a state prisoner is seeking federal habeas corpus relief after having already been given an opportunity to fully litigate his Fourth Amendment claim at trial and on appeal. The Court found no reason to believe that the effect of the exclusionary rule would be eroded if search and seizure claims could not be raised in federal habeas corpus proceedings. It is extremely doubtful that police officers would be deterred from violating the Fourth Amendment for fear that federal habeas corpus review might uncover defects in a search and seizure that were not revealed at trial or on appeal. Even if federal habeas corpus review does create a small disincentive to Fourth Amendment violations, the resulting benefit is outweighed by the detrimental ramifications to the criminal justice system of applying the exclusionary rule. See Stone v. Powell,

supra at 5318-5321; Schneckloth v. Bustamonte, supra at 250, Justice Powell's concurring opinion.

In the instant case, petitioner had ample opportunity under New York law former Code of Criminal Procedure 813 to litigate his Fourth Amendment claim. New York law provided for motions to suppress prior to trial or in a hearing in midtrial. That petitioner failed to utilize these opportunities is not the State's fault. Significantly, petitioner in his brief makes no attempt to excuse his failure to make a pretrial or midtrial motion to suppress; he simply asserts that his catchall "constitutional" objection was sufficient to raise and litigate the issue.

It is important to note that Stone v. Powell and Wolff v. Rice did not turn on the adequacy of the state court factual hearings or motions to suppress in those cases under 28 U.S.C. § 2254(d). Were this the case, the Court would not have reached the result that it did. The material part of the holding in these cases was the necessity of an opportunity to litigate the claim before federal review could be foreclosed. Petitioner had this opportunity.

The only question remaining is whether Stone v. Powell should be applied to petitioner's federal habeas petition which was being appealed from the District Court's denial of relief when Stone v. Powell was decided. The Supreme Court has indicated clearly that Stone v. Powell should be applied to past or pending cases.

In United States ex rel. Mungo v. LaVallee, 522 F. 2d 211 (2d Cir., 1975), this Court on federal habeas review upset a state court conviction on Fourth Amendment grounds. On the warden's application for certiorari, the Supreme Court reversed on July 6, 1976 (428 U.S. ___, 96 S. Ct. 3215). The Court granted the petition for certiorari, vacated the judgment of the Second Circuit, and remanded the case for further consideration in light of Wolff v. Rice, ___ U.S. ___ (1976) and Stone v. Powell, ___ U.S. ___ (1976). Clearly, the Supreme Court means its decision to apply to pending as well as future cases. At least five federal Circuits have already applied Stone v. Powell retroactively. See 19 Criminal Law Reporter 1093; Poindexter v. Wolff, (8th Cir., August 10, 1976, 19 Criminal Law Reporter 2436); Frankboner v. Paderick, (4th Cir., August 4, 1976, 19

Criminal Law Reporter 2463); George v. Blackwell, (5th Cir., August 25, 1976, 19 Criminal Law Reporter 2487); Chavez v. Rodriquez, (10th Cir., August 26, 1976, 19 Criminal Law Reporter 2509); Bracco v. Reed, (9th Cir., August 20, 1976, 19 Criminal Law Reporter 2513).

POINT II

PETITIONER FAILED TO EXHAUST STATE REMEDIES AND FAILED TO PROPERLY ASSERT HIS CLAIMS IN STATE COURT. PETITIONER'S PROCEDURAL DEFAULTS IN STATE COURT BAR FEDERAL HABEAS REVIEW OF HIS FOURTH AMENDMENT CLAIM.

Petitioner claims that he adequately raised his constitutional objections in state court and that the District Court's conclusions to the contrary were erroneous. Petitioner concludes he is entitled to federal habeas review of his Fourth Amendment claim. These arguments are utterly without merit.

Petitioner begins his argument (Br. 13) with the claim that he has exhausted state remedies. However, it is conceded that when petitioner's trial counsel was faced with palmprint evidence at trial, he did nothing more than mouth a catchall "constitutional" objection in midtrial. Nowhere in the colloquy cited by petitioner

is the specific grounds for objection set forth. Nowhere in the colloquy is the Fourth Amendment even mentioned by name. Such an objection was insufficient to apprise any appellate court of precisely what it was that counsel was objecting to.* For example, the catchall objection could have been on Fifth Amendment grounds rather than Fourth Amendment grounds.**

Under the exhaustion doctrine the state courts must be given a "fair opportunity" to consider petitioner's Fourth Amendment claim. Picard v. Connor, 404 U.S. 270, 276 (1971). The state court claim must be the same as the claim in federal court. Picard, supra, at 276. In Picard, the petitioner had claimed in the state courts that based on certain facts he had been denied his constitutional rights under the Fifth Amendment. He then presented the same facts to the federal courts which

* The need for precision in making objections has been repeatedly stressed. On Lee v. United States, 343 U.S. 747, 749, n. 3 (1952); United States v. Indiviglio, 352 F. 2d 276 (2d Cir., 1965) (en banc); cert. den. 383 U.S. 907 (1966).

** Indeed the objection appears to be a Fifth Amendment objection in view of counsel's statement that his constitutional objection was based on "the taking of these prints, and as such we object to them" and the court's query, "Your objection is then on constitutional grounds to the mere fact of the taking of the prints?", to which counsel replied, "Yes, sir." (emphasis added).

sua sponte considered them in light of the equal protection clause. The Supreme Court reversed on exhaustion grounds, finding that the same claim had not been presented to both courts.

This Court has interpreted "fair opportunity" to require a precise presentation to the state courts of the same claims pressed in the federal habeas court. General assertions of denial of constitutional rights or due process rights, as here, are insufficient. United States ex rel. Gibbs v. Zelker, 496 F. 2d 991, 993 (2d Cir., 1973) (general assertion that seizure of knife violated constitutional rights insufficient for exhaustion purposes to raise claim of Fifth Amendment violation); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1125 (2d Cir.), cert. den. 409 U.S. 1045 (1972) (general due process argument in state court not sufficiently precise for exhaustion purposes where claim in federal habeas court couched specifically in terms of Fifth Amendment); Mayer v. Moeykens, 494 F. 2d 855 (2d Cir.), cert. den. 417 U.S. 926 (claim that arrest warrant "insufficient" not identical to claim that no probable cause existed for arrest). See also United States ex rel. McDonald v.

Deegan, 284 F. Supp. 166 (S.D.N.Y., 1968); United States ex rel. Glyden v. Singerman, 350 F. Supp. 246 (S.D.N.Y., 1972). Clearly, a cognizable "Fourth Amendment" claim was never adequately presented to the state court for exhaustion purposes.

It should also be noted that petitioner nowhere challenges the District Court's statement or the Rockland County Court's assertion (350 N.Y.S. 2d at 585) (A 12) that petitioner raised his Fourth Amendment claim for the first time at oral argument in the New York State Court of Appeals, thus bypassing the Appellate Division. Claims not adequately raised on appeal have not been exhausted. United States ex rel. Springle v. Follette, 435 F. 2d 1380, 1384 (2d Cir., 1970), cert. den. 401 U.S. 980. See also Pitchess v. Davis, 421 U.S. 482, 487 (1975) (exhaustion requirement includes recourse, where available, to full appellate review) [emphasis added]; United States ex rel. Vanderhorst v. LaVallee, 417 F. 2d 411, 412, n. 3 (2d Cir., 1969); United States ex rel. Jiggetts v. Follette, 260 F. Supp. 301 (S.D.N.Y., 1966); Ex Parte Hawk, 321 U.S. 114, 116-117 (1944).

Assuming arguendo the catchall "constitutional" objection was a recognizable Fourth Amendment objection

for exhaustion purposes it is still plain that this objection was completely insufficient to assert the claim under State law.

Petitioner was obliged to make a motion to suppress evidence prior to the trial. Code of Criminal Procedure, 813(d)(1). This he concededly failed to do, and petitioner does not now contend that he falls within any of the excusing exceptions set forth in the statute.

Assuming arguendo petitioner's trial counsel was entitled under one of the three exceptions of former CCP 813(d)(1) to raise the Fourth Amendment issue during trial, such counsel still failed in raising and preserving the issue properly. Petitioner's counsel was obliged to make a motion to suppress evidence during trial in the absence of the jury, on which the court would have been obligated to hear evidence and decide all issues of fact and law (emphasis added), CCP 813 (d)(3). This he also completely failed to do.*

* In its opinion, the District Court alluded to a letter from petitioner's counsel to the District Court in which it was asserted that "[i]t was not until the commencement of trial that counsel learned that the police may not have had probable cause for the detention and printing of petitioner." (A 12). Of course, this letter is "evidence" of nothing; however, assuming the truth of this quoted statement, petitioner's failure to invoke the provisions for motions or hearings in midtrial, CCP 813(d)(3) still remains unexcused.

Petitioner's defaults were defined under then State law as a waiver. Former CCP 813(d)(4) stated:

> "If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained."

These failures were not merely simple technical failures; on the contrary they were critical failures to conform to basic procedural requisites. As Chief Judge Fuld noted in his opinion at 24 N Y 2d 670, the failure of defense counsel to challenge the evidence in the proper manner deprived the prosecution of any opportunity to show the information in the hands of the police at the time of petitioner's arrest. Today, ten years later, petitioner for the first time would ask the State to make an evidentiary showing of some kind that petitioner's arrest was based on probable cause.* Obviously this request comes somewhat tardy and prejudices the People. This case is a classic demonstration of the wisdom and

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* Petitioner in his brief (p. 9) complains that the State Court of Appeals was constrained to "speculate" as to proof which the People might have offered to show probable cause. This criticism is not well taken since it was trial counsel's failure to demand a showing of the proof through a timely suppression motion which necessitated the "speculation."

rationale of rules requiring adequate contemporary preservation of issues for appeal.

The Supreme Court in Henry v. Mississippi, 379 U.S. 443, 447 (1965) recognized the importance of state procedural requirements when federal courts are reviewing state convictions. In Henry the Supreme Court ruled that a litigant's procedural defaults in State proceedings do not prevent vindication of his federal rights on federal review unless the State's insistence on compliance with its procedural rule serves a legitimate State interest. That is certainly the case here. The Mississippi rule which the Supreme Court thought served a legitimate State interest in Henry is essentially identical to the New York rule here in question. Both rules require pretrial or contemporaneous objection to the introduction of illegal evidence. The Supreme Court noted the advantages of a contemporaneous objection rule:

> "By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and a new trial avoided." Henry v. Mississippi, supra, at 448.

The sound policy and reason for such a rule could not be made more plain than in this case, where petitioner would have a federal court litigate a claim that could and should have been litigated ten years ago in a state court at a time when any claimed error could have been cured by a timely motion to suppress.*

Three New York State courts in written opinions have found that petitioner failed to adequately preserve the Fourth Amendment issue for purposes of appellate review. The District Court correctly reached the inexorable conclusion that the holdings of the State Court of Appeals must be understood as holding that counsel's catchall constitutional objection was not sufficiently specific to raise the fruit of an unlawful arrest argument. The State Courts' interpretation of State law must be given controlling weight; state courts are the final expositors of State law. England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 415 (1964); Ker v. California, 374 U.S. 23 (1963); Schaefer v. Leone, 443 F. 2d 182 (2d Cir., 1971). As the Supreme Court said in Brady v. Maryland, 373 U.S.

* The Federal Rules of Criminal Procedure also require that motions to suppress be made prior to trial in federal courts on penalty of waiver. F.R.Crim.P. 12(b)(3), 12f.

83, 90 (1963):

> "We usually walk on treacherous ground when we explore state law, for state courts, state agencies, and state legislatures are its final expositors under our federal regime."

Petitioner argues that trial counsel's objection came "even prior to the existence of specific federal case law authority supporting that position" (Br. 18-19), and that trial counsel made his objection "as best as he could, given the rapidly-changing standards of Fourth Amendment law at the time of appellant's trial" (Br. 16, 17). If this argument is meant to convey the impression that Davis v. Mississippi, supra, was an unexpected Fourth Amendment interpretation coming out of the blue, and therefore a factor tending to excuse trial counsel's procedural defaults, the argument is refuted by petitioner's own admission (p. 22) "that Davis is not a new doctrine but a mere clarification or extension of Mapp." The Supreme Court in Davis emphasized this very point. Davis, at 724. Obviously, counsel need not have cases squarely on point before making a legal argument; indeed, if this were the case the law would never evolve or grow; the law evolves through logical extension of legal principles to

different factual patterns. That the taking of fingerprints might be subject to Fourth Amendment constraints was therefore a perfectly reasonable argument to make prior to Davis.

The only remaining question for this Court is whether petitioner's procedural defaults in state court, through which he forfeited state appellate and collateral review, necessarily in consequence also bars federal habeas review. Unquestionably federal habeas review is foreclosed by the defaults in this case.

The rule in this Circuit is that a motion to suppress not timely made under state law operates as a waiver for purposes of federal habeas review. United States ex rel. Tarallo, 433 F. 2d 4 (2d Cir., 1970). The identical principle applies here and forecloses federal habeas review. Petitioner conveniently fails to mention Tarallo, which is controlling here.

Petitioner argues that he was not guilty of "deliberate bypass" of state remedies, Fay v. Noia, 372 U.S. 391, 438 (1963), and accordingly cannot be held to have waived federal habeas review of his claim.

This argument is without merit. The premise

of the argument - that any conceivable federal claim must be "deliberately" bypassed before a waiver may occur for purposes of federal habeas review - is simply incorrect. That this is so is clear from cases such as Tarallo. The proposition that a constitutional claim can be waived for federal habeas purposes absent an express finding of "deliberate bypass" was most recently reaffirmed in Estelle v. Williams, 44 U.S.L.W. 4609 (May 3, 1976) and Francis v. Henderson, 44 U.S.L.W. 4620 (May 3, 1976). In Estelle v. Williams, the Supreme Court held on federal habeas review that the failure of a prisoner to object to his being tried in jail attire constituted a waiver where the prisoner claimed standing trial in such garb deprived him of his constitutional right to a fair trial. The Court also noted that "[w]e are not confronted with an alleged relinguishment of a fundamental right of the sort at issue in Johnson v. Zerbst, 304 U.S. 458 (assistance of counsel)."

Similarly, in Francis v. Henderson, the Court held on federal habeas review that a prisoner's constitutional claim that Negroes had been excluded from the grand jury that indicted him could not be raised in a federal habeas proceeding where, inter alia, there was

no showing of cause for his failure to timely raise the claim under state law. Similarly, in the instant case there is no showing of cause for failing to assert adequately the Fourth Amendment claim under state law.

Finally, petitioner's position would have the practical effect of rendering New York's procedural timeliness rules a nullity. Federal habeas review was never meant to work such a result.

It should be noted that petitioner nowhere contests the accuracy of the fingerprints.* The integrity of the evidence in Fourth Amendment cases is typically not in question. Nor is there a constitutional "right" to have illegally seized evidence suppressed at trial, as petitioner apparently assumes. As the Supreme Court noted in Stone v. Powell, supra, the exclusionary rule is simply a judicially created remedy to give effect to a constitutional right to be free of unreasonable searches and seizures.

* This appears to be another case where guilt or innocence is not the issue; petitioner does not now claim he did not kill his wife. See Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. Law Rev. 142 (1970); Stone v. Powell, supra; Schneckloth v. Bustamonte, 412 U.S. 218, 250, 264-275 (Powell, J., concurring); Ralls v. Manson, 503 F. 2d 491, 494 (2d Cir., 1974) (Lumbard, J., concurring).

Petitioner places great reliance (Br. 18) on this Circuit's decision in Cameron v. Fastoff, ___ 2d Cir. ___ (4/22/76), Slip Op. 3369. This reliance is misplaced. Petitioner's premise - that he properly presented his claim to the state trial court - is incorrect for the reasons discussed at length above. The Court in Fastoff felt state remedies might still be available; in the facts of this case however the state courts have determined that remedies have been waived. The effect of that waiver for federal habeas purposes is thus at issue in this case but was not at issue in Cameron.

Under all the foregoing circumstances, and in view of the controlling effect of Tarallo, it is clear that petitioner is entitled to no relief in the federal courts. Petitioner's apparent attempt to argue the merits on the probable cause issue (Brief, Point II, pp. 20, et seq.) simply must be ignored. The merits are not before this Court. The merits have never been before any Court. The time to develop a case on the merits was at an evidentiary hearing ten years ago in a state court, a hearing which through no fault of the State's was never held. Justice would be ill-served by

permitting this claim to be litigated for the first time ten years after the fact.

CONCLUSION

THE JUDGMENT BELOW MUST BE AFFIRMED.

Dated: New York, New York
October 8, 1976

Respectfully submitted,

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Attorney General of the
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for respondent-appellee herein. On the 8th ~~day~~ of October, 1976, he served the annexed upon the following named person :

Jesse Berman
351 Broadway
New York, New York
10013

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Ralph McMurry

Sworn to before me this
8th day of October, 1976

Carol Sala

Assistant Attorney General
of the State of New York